Comparative analysis of JKR Sarawak form of contract and Malaysia Standard form of building contract (PWD203A)

A I A Yunus[1], W M N W Muhammad[1] and M N F Saaid[1]

[1] Department of Quantity Surveying, Faculty of Architecture, Planning and Surveying, Universiti Teknologi MARA (UiTM) Cawangan Sarawak, Kampus Samarahan, Sarawak, Malaysia

E-mail: awangihsan@sarawak.uitm.edu.my

Abstract. Standard form of contract is normally being used in Malaysia construction industry in establishing legal relation between contracting parties. Generally, most of Malaysia federal government construction project used PWD203A which is a standard form of contract to be used where Bills of Quantities Form Part of the Contract and it is issued by Public Works Department (PWD/JKR). On the other hand in Sarawak, the largest state in Malaysia, the state government has issued their own standard form of contract namely JKR Sarawak Form of Contract 2006. Even both forms have been used widely in construction industry; there is still lack of understanding on both forms. The aim of this paper is to identify significant provision on both forms of contract. Document analysis has been adopted in conducting an in-depth review on both forms. It is found that, both forms of contracts have differences and similarities on several provisions specifically matters to definitions and general; execution of the works; payments, completion and final account; and delay, dispute resolution and determination.

1. Introduction

The general conditions of a contract are usually compiled as a set of documents known as the standard forms of contract. Construction players tend to adopt a standard form of contract in regulating their contractual responsibilities for contract administration process [1]. Standard forms of contract (generally referred to as standard forms) are normally in a printed form and published by an authoritative body of the industry that is recognised by government and construction industry parties. These forms set out the terms or conditions on which the contracts between the parties are to be carried out. It is also to be noted that these terms or conditions are deemed to be agreed and are not subject to further negotiation and/or amendment [2]. According to definition by Nayagam and Pathmavathy [3], standard form construction contracts provide a basic legal framework identifying the rights, obligations and duties of the parties; establish the scope of the rights and duties of the contract administrative procedures necessary for contract's operation.

According to Singh [2], there are some apparent positive reasons justifying the use of the standard forms rather than other methods. The forms have gone through a process of negotiation between several sectors of the industry and as a result act as a compromise between the various powerful interest groups. The standard forms allocate risks fairly between parties. Most such forms are time tested and practitioners are aware of their workability, limitations and drawbacks. Availability of these various types of forms indicates that the standard forms gain popularity from the construction industry. In fact, the efficiency and effectiveness of standard forms make it become a favour. The

construction industry parties prefer to use standard form for their contract due to it promotes administrative, time and cost efficiency. Moreover, the standard form is a legal framework with standardised format, so the construction professionals are more familiar with their limitations, procedures, operations which leads to project efficiency. Furthermore, Nayagam and Pathmavathy [3] suggested that there is a body of judicial pronouncements accumulated over the years on standard forms, there is some certainty in meaning.

Malaysia have a quite significant number of Standard Forms of Contract in the engineering/construction field although it is relatively a small country. This may or may not augur well for the industry as a whole since these Standard Forms are being supplemented by an increasing number of modified or 'tailored' forms. This has also reflected the extent of fragmentation of the industry. Even so, it may wise to review the basic forms under the following categories which are the government or public-sector contracts, private sector contracts and contract or an International nature. [3].

For the purposes of this study, only the standard forms under the government/public sector contracts are discussed. The JKR Sarawak Form of Contract 2006 are chosen along with the Standard Form of Contract to be used where Bills of Quantities Form Part of the Contract, PWD 203A (Rev. 2010) often referred as PWD203A for the purpose of analysis and comparison on both of these standard forms. The scope of this paper focus on the construction contract management area only.

The JKR Sarawak Form of Contract 2006 is the standard form of contracts which usually being used not only by the government sector contracts, but also for the private sector contracts. It was first revised in May, 1961; consisting of 45 clauses or conditions that are generally necessary for the construction projects. PWD 75 revision started as early as year 2000, but Version 2006 was only launched in 2007 [4]. PWD 75 is succeeded by JKR Sarawak Form of Contract 2006 which contains 5 parts and 49 clauses. Many private and governmental organisations are still using the older version due to reasons such as unfinished projects, familiarity with old forms and in some cases, surprising limited awareness of the existence of the new form [5]. PWD 203A is the most common standard forms of contract for government project in Malaysia by both federal and state government. Nevertheless, in Sarawak, PWD203A is only being used for federal project while the JKR Sarawak Standard Form of Contract 2006 for state government's projects. The findings for this problem are being revealed out through a detail comparative analysis between the JKR Sarawak Form of Contract 2006 and the PWD 203A.

The aim of this paper is to cater the construction industry a deeper knowledge and better understanding of JKR Sarawak Form of Contract 2006 and PWD 203A through their comparative analysis. It is achieved by critically analysing both JKR Sarawak Form of Contract 2006 and PWD 203A according to the significance area of contractual management.

2. Research Methodology

The methodology adopted for the purpose of this particular study is fundamentally through document analysis on both JKR Sarawak Form of Contract 2006 and Malaysia Standard Form of Contract to be used where Bills of Quantities Form Part of the Contract, PWD 203A (Rev. 2010). The purpose of having document analysis is to compare both standard forms through several elements namely; definitions and general; execution of the works; payments, completion and final account; and delay, dispute resolution and determination.

3. Results and Discussion

The analysis is conducted for two (2) standard forms of contract that is JKR Sarawak Form of Contract 2006 [6] and PWD203A [7]. The reader should refer to table 1 that summarizes the findings.

Table 1. Comparative Analysis: JKR Sarawak Form of Contract 2006 and PWD203A (Rev.2010).

Item	Provision	JKR Sarawak Form of Contract	PWD203A (Rev.2010)	Remarks
DEFINITION AND GENERAL				
a)	Obligation of employer	Clause 5.0	No provision	Difference Clearly stated the obligation of employer in the JKR Sarawak Form of Contract.
b)	Basic of Contract	Clause 8.0	No provision	Difference In terms of the usage of the JKR Sarawak Form of Contract where both contract based on bills of quantities and contract based on drawing and specification use the same form of contract For PWD203A, it is purposely for contract where Bills of Quantities Form Part of Contract.
c)	Performance Security/Performance Bond and Performance Guarantee Sum	Clause 10.0	Clause 13.0	Difference JKR Sarawak Form of Contract has the option for the contractor to use cash deposit as the method of providing the performance security. The Employer can deduct five percent (5%) of contract sum from the contractor if he failed to produce Performance Security for JKR Sarawak Form of Contract. PWD203A has the option of Performance Guarantee Sum where ten percent (10%) will be deducted from payment certificate every month until the amount equivalent to five percent (5%) of contract sum.
EXECUTION OF WORKS				
a)	S.O and S.O Representatives.			
	i) S.O Authority to Delegate	Clause 11.1 (c)	Clause 3.3 (c)	Difference JKR Sarawak Form of Contract has the time period of seven (7) days for contractor to refer the matter to S.O and another seven (7) days also for S.O to make decision if the Contractor dissatisfied with the decision from the S.O Representatives. PWD203A keep silence on this matter. Also in the PWD203A, there is no such provision where S.O Representative decision will apply if the S.O fails to make any decision.
	ii) Assistant (s) to the S.O and S.O Representatives.	Clause 11.2	No provision	Difference Assistant to the S.O and S.O Representatives can be appointed if necessary in the JKR Sarawak Form of Contract.

Item	Provision	JKR Sarawak Form of Contract	PWD203A (Rev.2010)	Remarks
b)	Site Possession			
	i) Condition Precedent to the Commencement of Work	Clause 13.2(a) Clause 13.2 (b) Clause 13.3(c)	Clause 38.1	Differences JKR Sarawak Form of Contract 2006 has clear provision when the contractor shall start the works on site after receiving the site possession from the Government. It is also stated the contractor must inform the proposed commencement date. PWD203A did not have such provision regarding these matters. PWD203A required the contractor to submit Performance Bond. Such provision did not apply in the JKR Sarawak Form of Contract 2006.
	ii) Possession of Site	Clause 13.1	Clause 38.2	Difference In JKR Sarawak Form of Contract 2006, the contractor will be given four (4) weeks from the date of Letter of Acceptance, the site possession.
PAYMENT, COMPLETION AND FINAL ACCOUNT				
a)	Variation	Clause 32 Clause 32.1(c) Clause 32.5	Clause 24	Difference In JKR Sarawak Form of Contract 2006, contractor can notify the S.O. if the contractor considers the S.O instruction to be a variation although not clearly identified as variation. On the other hand, in PWD203A, there is no such provision allowing the contractor to propose variation.
b)	Payment and Final Account			
	i)Advance Payment	No provision	Clause 69	Difference JKR Sarawak Form of Contract 2006 has no provision for advance payment.
	ii) Interim Certificate and Payment to Contractor	Clause 33.1, Clause 33.2	Clause 28.3 Clause 28.4	Difference PWD203A has allowed a provision for the S.O to issue the payment certificate within fourteen (14) days after the site valuation being made. The amount fixed for material on site for JKR Sarawak Form of Contract 2006 is seventy-five percent (75%) of the value of work done while for PWD203A; it is ninety percent (90%)
	ii)Final account	Clause 39	Clause 31	Similarity Both of standard form have the similarity between the final account in terms of duration for the contractor to submit full claim for S.O to prepare final account

Item	Provision	JKR Sarawak Form of Contract	PWD203A (Rev.2010)	Remarks
c)	Completion of Works	Clause 34	Clause 39	Difference PWD203A stated clearly the requirement need to be fulfilled before the issuance of the Certificate of Practical Completion. However, no such clauses appeared in the JKR Sarawak Form of Contract 2006
DELAY, DISPUTE RESOLUTION AND DETERMINATION				
a)	Delay and Extension of Time	Clause 41	Clause 43	Difference JKR Sarawak Form of Contract required the contractor to issue notice in writing to the S.O not later than seven (7) days after the cause of the delay first arose. A further notice need to be issued out to the S.O after the first notice not later than thirty (30) days. No provision regarding to this matter are available for the PWD203A.
b)	Determination	Clause 44	Clause 51,52,53,54,55 and 56	Differences The PWD203A explains more and in details regarding the determination of contractor employment. Also in the PWD203A, it has the provision of events and consequences default by the government where in the JKR Sarawak Form of Contract, there are no such provision.
c)	Dispute Resolution	Clause 43.3	Clause 66	Difference PWD203A has more direct process in terms of the dispute resolution where if any dispute occurred, the parties shall refer to the officer named in the Appendix and if they are not satisfied with the decision or did not received any decision, they can refer to arbitration JKR Sarawak has more complicated process of dispute resolution where they need to refer the matter to S.O and then Employer before they can seek alternative dispute resolution method, the last option then will be arbitration or litigation.

3.1. Definition and general

3.1.1. Obligation of employer. The obligation of the Employer is clearly set out in Clause 5.0 [General Obligation of Employer] of JKR Sarawak Form of Contract 2006 whereby the employer owes the duties of [1] Right of access to and possession the site; [2] Necessary Approvals from Relevant Authorities; [3] Payment to the Contractor; [4] Interference with The Performance of Contract by Contractor; [5] Superintending Officer's appointment. However, in PWD 203A there are no clear provision provided for the duty of Government.

3.1.2. Basic of contract. The JKR Sarawak of Contract 2006 can to be used for both contract based on Bills of Quantities and Contract based on Drawing and Specification. Clause 8.0 Basic of Contract stated that for Contract based on Bills of Quantities, the clause to be refer is Clause 8.1 and for Contract based on Drawing and Specification, the clause is 8.2. For PWD203A meanwhile, it is purposely for contract where Bills of Quantities Form Part of Contract.

3.1.3. Performance security/performance bond or performance guarantee sum. The Contractor's duty before the commencement of works is to provide the Performance Security or the Performance Bond as a guarantee for the Employer or the Government. PWD 203A show differences from JKR Sarawak Form of Contract 2006 by providing the option of Performance Guarantee Sum when the Contractor failed to provide Performance bond in time. For JKR Sarawak Form of Contract 2006 meanwhile, if the contractor failed to provide Performance Security, the Employer will deduct the amount from any sums payable to the contractor and retain the amount as a cash deposit. JKR Sarawak Form of Contract 2006 provides an option of cash deposit for Performance Security besides providing the bond from a license bank or other acceptable institution. However, in PWD 203A there are no provision for providing cash deposit for Performance Bond.

3.2. Execution of works

3.2.1. Superintending officer and superintending officer's representatives. Both Standard Forms of Contract used the same terms for Superintending Officer. The S.O. was the person who had full responsibilities in supervising and carrying out the works in the Contract but they may only exercise the authority that attributed to them under the Contract. Both the JKR Sarawak Form of Contract 2006 and the PWD 203A allow the S.O. to delegate their authority to S.O.'s Representative provided that such delegation is in writing. In the condition where the S.O.'s Representative fail to disapprove work, plant or material, the Contractor shall not prejudice the right and power of the S.O. Instead of this, the S.O. may from time to time give instruction to the Contractor and the contractor shall comply with it regardless such instruction is in writing or in oral.

3.2.2. Site possession. Under the provision of site possession, it provides that the Contractor shall provide Performance Bond stipulated under Clause 13 and Insurance Policy as stated under clause 15 and clause 18 for PWD203A before the commencement of the work. Only insurance policy is to be provided under JKR Sarawak Form of Contract 2006 as a condition precedent to the commencement of the work. In terms of fixing the date for possession, JKR Sarawak Form of Contract has the clearer provision where it stated under clause 13.1 the date possession of site shall be four (4) weeks from the Date of Letter of Acceptance. There are no clear provision provided for fixing the date of possession.

3.3. Payments, completion and final account

3.3.1. Variations. The term 'Variation' means a change in the Contract Document which necessitates the alteration or modification of the design, quality or quantity of the works. Both forms provided the provision of variation. Principally, the S.O. may issue written instruction to request the Contractor to amend or alternate for any part of work. Clause 32.5 [Variation Proposal from Contractor] of JKR Sarawak Form of Contract allow the Contractor to submit a written proposal for variation to the S.O. However, PWD 203A is keep silence for the right of Contractor to propose variation.

3.3.2. Payment and final account. Advance payment is a payment paid for the Contractor in advance by the Employer; its provision was set out in Clause 69.0 of PWD203A but such provision is not provided under the JKR Sarawak Form of Contract. Whenever the Contractor executed the works including delivery to or adjacent to the works any unfixed materials or goods intended for the work, the S.O shall make the first valuation of the same. Usually once a month or at the discretion of the S.O

the valuation of the works shall be done by the S.O. Both of these standard forms of contract has the same provision regarding the payment except for the value of unfixed material and goods delivered to or adjacent to the site where for JKR Sarawak Form of Contract, it is value at seventy-five (75) percent of the unfixed material and goods delivered to or adjacent to the site and ninety percent (90%) for the PWD 203A. PWD 203A also shows differences from the JKR Sarawak Form of Contract 2006 in term of the issuance of interim certificate where Clause 28.3 of PWD 203A required the S.O. issue interim certificate within fourteen (14) days from the date of any such valuation. However, the JKR Sarawak Form of Contract 2006 is keep silence for this purpose.

For the preparation and issuance of Final Certificate the Contractor submit full of all claims together with supporting documents to the S.O for enable the final account to be prepared by the S.O. Both of the standard form of contract has the same provision regarding this matter.

3.3.3. Completion of works. Upon completion of the works, contractor will be issued with the Certificate of Practical Completion. Both of these standard forms of contract have the similar provision in terms of issuing certificate of practical completion where contractor have the responsibility to inform the S.O whenever the contractor thinks that the work have been completed. Within fourteen (14) days of receiving such notice by the contractor, the S.O will carry out an inspection of the works. If the S.O satisfies with the works, then the S.O shall issue Certificate of Practical Completion and if there are any defects of minor nature or any works required to be completed, the S.O shall issue an instruction to the contractor. Clause 39.5 of PWD203A stated criteria that need to be fulfil by the contractor before the issuance of the Certificate of Practical Completion. However, there are no such provision regarding the criteria for practical completion for JKR Sarawak Form of Contract 2006.

3.4. Delay, dispute resolution and determination

3.4.1. Delay and extension of time. Extension of time is the additional time granted to the contractor to complete the works beyond the original date of completion. Any extension of time can only be granted in respect of an event which is likely to delay completion or which had delay the completion. The contractor's claim for extension of time must be based solely on one or more of the relevant events or causes of delay under clause 41.5 and 41.6 under JKR Sarawak Form of Contract and clause 43.1 (a)-(j) of PWD203A. Both JKR Sarawak Form of Contract 2006 and PWD 203A had set out the cause of delay under this provision but the causes as set out in JKR Sarawak Form of Contract 2006 are more complete and specific compare to the PWD 203A. JKR Sarawak Form of Contract required the contractor to issue notice in writing to the S.O not later than seven (7) days after the cause of the delay first arose. A further notice need to be issued out to the S.O after the first notice not later than thirty (30) days. No provision regarding to this matter are available for the PWD203A.

3.4.2. Determination

Under provision of termination, PWD203A allowed the Employer and the Contractor to terminate the Contract but in JKR Sarawak Form of Contract, only the Employer has the right to terminate the Contract. Both of standard form of contract explains in detail the event and consequences default by the contractor. For JKR Sarawak Form of Contract 2006, the determination of contractor's employment provision was set out in clause 44 where this provision explains the default for determination [Clause 44.1 and 44.2], effects of determination [Clause 44.3] and determination due to corrupt acts [Clause 44.4]. However more provisions can be found in the PWD203A where they are six (6) clauses related to the determination which are Events and Consequences Default by the Contractor [Clause 51], Termination on National Interest [Clause 52], Termination on Corruption, Unlawful or Illegal Activities [Clause 53], Payments Upon Suspension and Termination on National Interest [Clause 54], Events and Consequences of Default by the Government [Clause 55] and Certificate of Termination Cost [Clause 56]

3.4.3. Disputes resolution. Clause 43.3 of JKR Sarawak Form of Contract and Clause 66 of PWD203A respectively set out the provision for dispute resolution method. Clause 43.3 of JKR Sarawak Form of Contract provides that when dispute arise, the contractor shall refer the matter to the S.O for decision and if the decision is not of the satisfaction of the contractor, then the contractor refer the matter to the Employer. However, if the contractor still dissatisfied with the decision by the Employer, both parties shall then seek to agree upon alternative dispute resolution process to solve the dispute by means other than arbitration or litigation. The last alternative shall be arbitration or litigation to solve the dispute. Different from JKR Sarawak Form of Contract 2006, the PWD203A provides that disputes between the parties shall be referred to the officer named in the Appendix for a decision and if the parties fail to receive any decision within forty five (45) days or dissatisfied with any decision then the dispute will be referred to the arbitration.

4. Conclusion and recommendation

This paper managed to reveal the significant differences and similarities between JKR Sarawak Form of Contract 2006 and PWD 203A certain provisions. Both forms of contracts have differences and similarities matters to definitions and general; execution of the works; payments, completion and final account; and delay, dispute resolution and determination. These differences and similarities are thoroughly being formulated in complementing the needs of the standard form of contract according to the federal and local government's project. Even though this comparative analysis manages to reveal the significant differences and similarities, further studies is recommended to be conducted in gathering the feedback on the adoption of both standard forms in terms of suitability and future enhancement.

5. References

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